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No. 97-889

In The

Supreme Court of the United States

October Term, 1997

CEASAR WRIGHT,

Petitioner,

vs.

UNIVERSAL MARITIME SERVICE CORP., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

None of the Respondents are publicly held corporations or other publicly held entities, nor are they parents, subsidiaries, or affiliates of, or a trade association representing, a publicly held corporation or other publicly held entity. No other publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation.

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STATEMENT OF THE CASE

A. Proceedings Below

The Petition seeks review of an unpublished decision by the United States Court of Appeals for the Fourth Circuit, affirming an unpublished decision of the United States District Court for the District of South Carolina which adopted a Report and Recommendation of a Magistrate Judge of that court.

The decisional process in this action began with the Report and Recommendation of Magistrate Judge Robert S. Carr that summary judgment be entered for the Respondents dismissing Petitioner Ceasar Wright's Complaint, which alleged violations of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, ("ADA"). [J.A. 216-22.] Judge Carr concluded that Wright's failure to pursue his available remedies under a collectively-bargained grievance-and-arbitration procedure deprived the court below of jurisdiction to adjudicate Wright's ADA claim. This recommendation was adopted by the Honorable David C. Norton [J.A. 227-35], and this action was dismissed without prejudice. [J.A. 236.] After a motion for reconsideration was filed [J.A. 237 ff.], the court reaffirmed its earlier ruling [J.A. 273-78], finding it unnecessary to rule on a belatedly-filed "Motion to Compel Arbitration with Supporting Authorities (and Join Additional Party)" [J.A. 251-55], which was filed on the Friday before the court's Monday hearing on the motion to vacate. [*See* J.A. 9, docket entry 37 and unnumbered entry following.] An appeal was noticed two weeks thereafter. [J.A. 279-80].

Oral argument was held in the Fourth Circuit on July 7, 1997, and an unanimous, unpublished decision dated July 29, 1997 (121 F.3d 702 (mem.)) affirmed the District Court.

Following the grant of an extension of time by Order dated

October 16, 1997, Wright filed his Petition on November 25, 1997. Respondents requested and were granted an extension of time for the filing of this Brief (Order dated December 11, 1997).

B. Statement of Facts

Petitioner has been a longshoreman in the Port of Charleston, South Carolina, since 1970, working for various stevedoring contractors through referrals made by Local 1422 of the International Longshoremen's Association. [Complaint ¶¶ 11-13, J.A. 15.] On February 18, 1992, Wright fell from a cargo container and fractured his right heel. [Complaint, ¶ 14, J.A. 15.] Wright's physician of choice, orthopedist Howard Brilliant, opined that Wright would "never be able to work on the waterfront again"; a three-physician panel, consisting of Dr. Brilliant and two others, expressed the view that Wright would be permanently and totally disabled from performing longshoring duties; and Wright presented sworn testimony that his disability was permanent and total. [Complaint ¶ 15, J.A. 16; J.A. 134, 178] ("Claimant contends that he is permanently and totally disabled and not able to work on the waterfront or in any other capacity on an uninterrupted basis.") Wright's claim for benefits under the Longshore and Harbor Workers' Compensation Act was settled for a lump sum payment of $250,000, which settlement was approved by the United States Department of Labor on June 10, 1994. [Complaint, ¶ 17, J.A. 16; J.A. 175-179, 180-182.] By this time, Wright had also applied for, and was receiving, disability benefits from the Social Security Administration. [J.A. 25, 27, 29, 177, 189.]

However, on January 2, 1995, Wright appeared at the Local 1422 hiring hall, representing that he was ready and able to return to work. [Complaint, ¶ 20, J.A. 16; J.A. 194.] He later presented a note from Dr. Brilliant which purported to release him to return to work without restriction. [Complaint, ¶ 19, J.A. 16; Answer ¶ 19, J.A. 52; J.A. 60; J.A. 194.] This back-

to-work note was not issued in conjunction with a physical examination; Dr. Brilliant testified on deposition that he was simply permitting his patient to "see" if he could work. [J.A. 76-80, 106-07.] Thus, the allegations in the Petition regarding "resorption" of a calcaneus deposit in his heel were not presented to Respondents until after this litigation ensued.

From January 2 through January 11, 1995, Wright worked for four different stevedoring contractors. [Complaint, ¶ 21, J.A. 16-17.] When it was discovered that Wright was back at work, the stevedoring companies, both individually and acting through their multi-employer collective bargaining representative the South Carolina Stevedores Association ("SCSA"), advised Local 1422 that Wright would no longer be accepted for employment referral. [Complaint, ¶ 23, J.A. 17.] These letters (*e.g.*, J.A. 61; and *see* J.A. 169) specifically relied on the provisions of two documents which had been bargained between the Local and SCSA: the collective bargaining agreement and the Longshore Seniority Plan.

> It has come to our attention that Caesar [*sic*] Wright has returned to work although he was certified as permanently and totally disabled. Both paragraph 13(D)(6),[1] and paragraph 13(B)(1)[2] [of the collective

1. There shall be no interference with the Employer's right to shift men from hatch to hatch, ship to ship, dock to ship or ship to dock so long as the number of men shifted from any gang does not reduce the gang structure below the minimum required. . . .

   The Employer also reserves the right to hire and discharge. It is recognized that the Employer has the right to utilize men in any combination of job classification for which they are qualified. . . .

[Section 13.(D)(6).] [J.A. 157.]

2. The Employer shall give due regard to the following factors: (Cont'd)

> bargaining agreement] permit the employers to determine whether an employee is "qualified" to perform job assignment. Once an individual is certified as permanently and totally disabled, he is no longer qualified to perform longshore work of any kind.

[Defendants' Motion for Summary Judgment, Affidavit of James P. Lamb ("Lamb Affidavit"), ¶ 5 and Tab 3, J.A. 144, 169; *and see* J.A. 257, 261-62.]

Local 1422's response also was couched in contract terms:

> . . . Your quotation of 13(D)(6) and 13(B)(1)

(Cont'd)

> 1. Protecting the safety and health of all men employed in the operation.
>
> 2. Regulating stevedoring operations to best accomplish the safe, efficient and orderly movement of cargo.
>
> 3. Utilize modern methods and equipment in the interest of avoiding unnecessary manual labor. . . .
>
> 4. Making the best use of skilled manpower in light of the above consideration [*sic*].
>
> It is distinctly understood and agreed that the Union has the privilege of bringing to the attention of each Employer any practices which the Union finds are not in accord with the spirit of the foregoing. The Employers hereby agree to promptly investigate and give careful consideration to all suggestions and recommendations of the Union in light of the objectives set forth above. If such procedure still fails to satisfactorily dispose of any such questions, they shall be resolved through the arbitration procedure set forth in Clause 15. [Section 13.(B)(1)]. [J.A. 156.]

> suggests that our contract permits you to deny employment to Caesar [*sic*] Wright. I will advise you to take another look. In fact, 13(D)(6) charges the employer to utilize Caesar [*sic*] Wright in jobs he is qualified to perform and 13(B)(1) does not apply. If Caesar [*sic*] Wright is proven to have limited disability and he returns to work and can perform his duties, I believe Federal laws protect his right to do so under the "American with Disability Act." Further, by denying him employment, violates our current Collective Bargaining Agreement 15(A)(1)[3] "lock-out" of a member.

[Lamb Affidavit, J.A. 144-45, ¶ 6 and Tab 4, J.A. 170; and *see* J.A. 258-260.] No further proceedings were held; instead, Local 1422 advised Wright to proceed through counsel to assert his claims. [J.A. 173, 191, 195.]

Wright then filed charges of discrimination against three of SCSA's member companies [J.A. 24-32], later adding charges against three other SCSA members and SCSA itself. [J.A. 33-40] (SCSA and its members are collectively referred to as "Stevedores"). The Equal Employment Opportunity Commission dismissed Wright's charges and issued notices of right to sue [J.A. 41-46], whereupon this action was commenced.

REASONS FOR DENYING THE WRIT

Despite Petitioner's attempt to characterize the Fourth Circuit's decision as a lonely, contrarian voice, the issue presented is much more narrow and highly fact-specific: the

3. "During the term of this Agreement, the employer agrees that there shall be no lockouts of the members of the Union. . . ." [J.A. 159.]

question which should have been resolved through the collectively-bargained grievance procedure was whether Wright was "qualified" to resume service as a longshoreman in the Port of Charleston. Both the Stevedores and the Union deemed the dispute to involve the application and interpretation of the collective bargaining agreement. That agreement provides that it is "intended to cover all matters affecting wages, hours, and other terms and conditions of employment," and establishes dispute resolution procedures incorporating the broadest possible designation of arbitrable issues: "matters under dispute which cannot be promptly settled between the parties." There are no limitations on the arbitrator's authority other than as to the effective date of "any decision in favor of the Employee involving monetary aspects or discharge." Integral to this contractual dispute resolution procedure is a requirement that is, Respondents submit, dispositive of this case: Paragraph 17 of the agreement states, "it is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State law." Thus, in determining whether Wright was "qualified" for referral to work by the Union, an arbitrator would be required to apply any pertinent statutory standards, including those under the Americans with Disabilities Act, to that assessment. Wright's failure to pursue his remedies under that agreement is, it is respectfully submitted, fatal to his claims, as the courts below have held. Therefore, even in the absence of controlling precedent in the Fourth Circuit, the determinations of the Magistrate Judge, the District Judge, and the Fourth Circuit should not be disturbed.

Throughout the course of the proceedings below, Petitioner attempted to argue that *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 432, 136 L. Ed. 2d 330 (1996), was wrongly decided. Following the denial of certiorari in the *Austin* case, Petitioner turned to the fallback position that *Austin* was

distinguishable from the facts presented here. The Petition presented to this Court represents a return to the first argument, with Petitioner positing that, irrespective of the merits of his own case, employment discrimination claims are never subject to arbitration under a collective bargaining agreement. However, Petitioner's case is not the appropriate vehicle for such an analysis, as the discussion below demonstrates.

I.

THE "CONFLICT" IS NOT BETWEEN THE DECISION BELOW AND THOSE OF OTHER COURTS.

Both § 118 of the Civil Rights Act of 1991, Pub. L. 102-166, § 118, 105 Stat. 1071, 1081 (Nov. 21, 1991) and § 513 of the Americans with Disabilities Act, 42 U.S.C. § 12212, Pub. L. 101-336, Title V, § 513, 104 Stat. 377 (July 26, 1990), encouraged the use of alternative dispute resolution processes, including arbitration, for the resolution of disputes arising under the ADA. *See generally*, Keene, "Collective Bargaining and Compulsory Arbitration of Americans With Disabilities Act Claims," 48 Lab. L.J. 738 (1997) (advocating arbitration of ADA claims); Cole, "A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining *Alexander v. Gardner-Denver* in the Wake of *Gilmer v. Interstate/Johnson Lane Corp.*," 1997 B.Y.U.L. Rev. 591 (1997) (expressing view that *Alexander* is not persuasive as a precedent); Note, "Compulsory Arbitration in the Unionized Workplace: Reconciling *Gilmer, Gardner-Denver* and the Americans with Disabilities Act," 37 B.C.L. Rev. 479 (1996) ("compelling arbitration of ADA claims under . . . collective bargaining agreement is a sensible and reasonable approach"); *and compare*, Hodges, "Mediation and the Americans with Disabilities Act," 30 Ga. L. Rev. 431 (1996). A contrary view is expressed in Coleman & Vasquez, "Mandatory Arbitration of Statutory Issues Under Collective

Bargaining: *Austin* and its Progeny," 48 Lab. L.J. 703 (1977). This Congressional endorsement of arbitration is one of the foundation blocks for the Fourth Circuit's decision in *Austin*, which also involved an ADA claim. After all, a determination of whether an employee is "qualified" to perform a particular job is the "bread and butter" of traditional labor arbitration. This factual distinction demonstrates that much of the alleged "conflict among the circuits" presented by Petitioner is, in fact, inaptly characterized, as can be seen from simple reference to the issues presented in the other seven cases cited by Petitioner:

Tran v. Tran, 54 F.3d 115 (2d Cir. 1995), *cert denied*, __ U.S. __, 116 S. Ct. 1412, 134 L. Ed. 2d 542 (1996), decided prior to *Austin*, arose under the Fair Labor Standards Act. The Second Circuit, adhering to the rationale of *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), held that such statutory claims were not subject to arbitration under a collectively-bargained grievance procedure. *Tran* was considered by the panel majority in *Austin* as dissimilar to the issues presented to the Fourth Circuit in that case, and the court's analysis in that regard rejects the notion that *Tran* and *Austin* produced a "conflict in the circuits." 78 F.3d at 882 n.2.[4]

Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997) is supportive of the position of the Respondents. After an exhaustive analysis of the many ways in which collective bargaining arbitration procedures are *more* conducive to the protection of employee rights than is the case in other forms of employment arbitration, the court in *Cole* espoused a post-arbitration judicial review which would be "sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law." 105 F.3d 1487. *Cole*,

4. The petition for certiorari in *Austin*, which relied upon the *Tran/Austin* "conflict," was denied. *See* 65 U.S.L.W. 3190 (Aug. 28, 1997), set out *infra* at n.6.

therefore, supports, rather than criticizes, a procedure under which collectively bargained arbitration is the first step in the adjudication of employment discrimination claims.

Likewise, the question of the relative jurisdiction of labor arbitrators and federal district courts over employment discrimination claims was presented only tangentially in the other appellate decisions cited by Petitioner. For example, neither the collective bargaining agreement nor a copy of the District Court's order refusing to direct that plaintiff's sexual harassment claims be arbitrated was a part of the appellate record in *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1452 n.1, 1454 n.2 (10th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997), while in *Varner v. National Supermarkets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 946, 136 L. Ed. 2d 835 (1997), also a sexual harassment case, the court disposed of the employer's argument regarding exhaustion of grievance-and-arbitration procedures by simple reference to *Alexander v. Gardner-Denver Co.*, 415 U.S. 147 (1974) and *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994).[5] The extensive discussion of jurisdictional issues in *Penny v. United Parcel Service*, 128 F.3d 408 (6th Cir. 1997), arose on a contention that the Court of Appeals was without jurisdiction to entertain a plaintiff's appeal of the dismissal of his ADA/retaliation claims. The Sixth Circuit blazed no new trails, merely adopting the holdings in *Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519 (11th Cir. 1997), and *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 294, 139 L. Ed. 2d 227 (1997), and citing *Harrison, Varner and Tran. Penny*, 128 F.3d at 411-14. *Brisentine*, 117 F.3d at 522-26, in turn, opted for

5. The *Stacks* decision refused to give "any weight" to an arbitration decision finding that the plaintiff had been dismissed for just cause, citing only *Alexander*. 27 F.3d 1326 n.3.

the Seventh Circuit's *Pryner* rationale rather than the Fourth Circuit's holding in *Austin*.

Consequently, the only reasoned resolutions of the general issue — whether so-called "statutory" claims on subject to compulsory arbitration under a collective bargaining agreement are those found in Chief Judge Posner's opinion in *Pryner* and in Judge Widener's opinion in *Austin*. Both of these cases were the subject of petitions for certiorari, and both petitions were denied.[6]

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6. Issues presented to this Court in the petitions in *Austin* and in *Pryner* framed the question as follows:

> Did *Gilmer*. . . , holding that agreement by individual security industry employee for arbitration of claims based on statutory anti-discrimination right is enforceable, overrule or limit line of cases beginning with *Alexander*. . . , holding that individual employee is entitled to pursue his own judicial cause of action to vindicate statutory anti-discrimination (or other individual employee protection) right even if applicable collective bargaining agreement grievance/arbitration procedure is also available to employee?

(*Austin*, No. 96-337, filed Aug. 28, 1996, 65 U.S. L.W. 3190);

> Is voluntary agreement to arbitrate federal statutory employment discrimination claims enforceable under *Gilmer*. . . notwithstanding that it is part of collective bargaining agreement?

(*Pryner*, No. 96-1830, filed May 16, 1997, 65 U.S.L.W. 3803).

By contrast, the petitions in *Varner* and *Harrison* have raised the question of arbitration as only one of several issues upon which review was sought:

(Cont'd)

The Petition now before the Court concedes that it is no more than a request for reconsideration of the denial of certiorari in *Austin*. While the "question presented" is couched in terms of review of the "holding" of "the court below," the body of the Petition is devoted to the proposition that *Austin* was wrongly decided: *see, e.g.*, Petition pp. 9-10, 16-17, 18-20. This Court has turned down the invitation to revisit this subject three times, and there is no basis upon which a different result should be reached here.

II.

PETITIONER'S ATTITUDE TOWARD THE FOURTH CIRCUIT IS UNWARRANTED.

An advocate's zeal in representing a client should never be allowed to foster incivility or a lack of professionalism. Unfortunately, the Petition in this case crosses that line. The sarcastic hyperbole employed in phrases such as "far from giving this Court's decision in *Alexander* a decent burial, the majority of the panel in *Austin* addressed *Alexander* only in a footnote" [Petition, p. 16] reaches its farthest extreme in Footnote 10 on page 19, which characterizes that court as intent upon

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(Cont'd)

> (1) [of 2] Should Supreme Court resolve conflict between Eighth Circuit's decision in this case and Fourth Circuit's decision in *Austin* . . .?

(*Varner*, No. 96-802, filed Nov. 21, 1996, 65. U.S.L.W. 3420).

> "(5)" [of 5] Can collective bargaining agreement compel employer to arbitrate claim that she may have under federal statute, such as Title VII?

(*Harrison*, No. 97-232, filed Aug. 6, 1997, 66 U.S.L.W. 3161, 3162).

"curtail[ing] rights under employment discrimination statutes." But the United States Court of Appeals for the Fourth Circuit is not an errant child deserving of punishment. If that Court were, in fact, acting in conscious disregard of this Court's pronouncements, it is difficult to understand how it could have decided *Brown v. Trans World Airlines*, 127 F.3d 337 (4th Cir. 1997) as it did. *Brown*, unlike *Austin*, involved a collective bargaining agreement negotiated under the Railway Labor Act, rather than the National Labor Relations Act. Accordingly, the Fourth Circuit followed this Court's decision in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) by holding that where the agreement in question does not refer to statutory provisions, and "there is no indication that the arbitrator would be bound to follow" interpretation under Federal antidiscrimination legislation, a plaintiff was not required to pursue her remedies under the mandatory arbitration provisions of the agreement arising out of alleged violations of Title VII and the Family and Medical Leave Act. The court stressed that, just as in *Austin*, it was reaching its conclusion "as a matter of contract interpretation." 127 F.3d at 341. In other words, the decisions in *Austin*, *Brown*, and *Wright* are all grounded in the language of the particular collective bargaining agreement in question, and a contention that such analysis is somehow at odds with this Court's precedents is untenable.

III.

THERE IS NO REQUIREMENT IN THE LAW THAT AN EMPLOYEE "PERSONALLY WAIVE HIS RIGHT TO A JUDICIAL TRIAL" IN ORDER TO BE FREED OF A REQUIREMENT TO FOLLOW A CONTRACTUAL GRIEVANCE-AND-ARBITRATION PROCEDURE.

The overt hostility of Petitioner to the entire collective bargaining process, manifested in his argument that a union is

incapable of representing the interests of individuals within the bargaining unit it represents, deserves only brief discussion. First, this is an issue which was not the gravamen of any of the decisions below, nor could it have been: in his Docketing Statement filed with the Fourth Circuit on January 2, 1997, one of the purported questions to be addressed on appeal was, "plaintiff never personally agreed to arbitrate statutory claims and he is not a party to the Collective Bargaining Agreement." This issue was abandoned on appeal, as was noted in the Brief of Appellees at page 21. Additionally, a fair reading of the "question presented" in the instant Petition does not permit this argument to be made.

Moving beyond the impermissability of a consideration of this argument on procedural grounds, it is strange to see Petitioner contending that no arbitration agreement is enforceable unless it was specifically bargained for by the individual. After all, the plaintiff in *Gilmer* signed a standard-form registration application, containing an agreement to "arbitrate any dispute, claim or controversy," which in turn incorporated by reference a New York Stock Exchange rule requiring arbitration of "[a]ny controversy . . . arising out of the employment or termination of employment of such registered representative." *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 196 n.1 (4th Cir. 1990). While the lack of "individual agreement" has been used by some courts in creating exceptions to the *Gilmer* rationale,[7] the persuasive force of such an argument fails completely when carried into the context of a union contract. Certainly, there may be instances in which arbitration under a

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7. *E.g.*, *Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, __ U.S. __, 116 S. Ct. 61, 133 L. Ed. 2d 24 (1995); and *cf.*, *Martin v. Dana Corp.*, __ F.3d __, 75 Fair Empl. Prac. Cas. (BNA) 870 (3d Cir. 1997) (Title VII claim not subject to arbitration where only union can "initiate and prosecute claims under the collective bargaining agreement").

collective bargaining agreement poses difficulties for the union in its attempted balance of collective and individual rights, such as an accusation of sexual harassment by one bargaining unit employee against another. But where discharge, reinstatement, and other "individual" claims are presented, there is no basis upon it could be said that the quality and vigor of the union's representation of the individual has been hampered either in the negotiation or in the administration of the agreement. In short, Petitioner's argument is anachronistic, acting upon a presumption that unions will engage in discrimination and unfair representation. In light of Petitioner's total unwillingness, at any point in this case, to accuse his union of unfair representation, the attempted interjection of his "individual" rights into this case is unworthy of further discussion.

CONCLUSION

The court below reviewed the provisions of the collective bargaining agreement and determined that there was no legitimate basis upon which Petitioner should have been allowed to circumvent the requirements of filing and pursuing a grievance under his collective bargaining agreement. The issue which would have been presented, had such arbitration taken place, was whether petitioner was "qualified" to return to work. The arbitrator's decision was contractually required to comport with all applicable federal and state laws. Given the genesis of Petitioner's complaint, it was obvious that contractual interpretation was contemplated, but the interpretation would necessarily have included an assessment of whether Petitioner was a "qualified individual with a disability" under the Americans with Disabilities Act. This Court's Rules specify that

> [a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

(S. Ct. Rule 10.) The findings below as to the interpretation of the collective bargaining agreement produced the results reached by the Fourth Circuit. Review of those findings is unwarranted, and the Petition should be denied.

Respectfully submitted,

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